SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 690.

JOHN E. HARRISON, SR.,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The only opinion of the Appellate Court of Illinois is the one entered on April 19, 1962, reported in 35 Ill. App. 2d 66, 181 N. E. 2d 737, set forth in Appendix B of the petition. The Appellate Court opinion set forth in Appendix A was filed, but recalled by that Court by order thereafter entered (App. 89 (39)).

QUESTIONS PRESENTED FOR REVIEW.

There are two questions presented for review:

(1) Was Anderson, the assailant, a pugnacious, vicious, and quarrelsome man prior to the assault on petitioner?

(2) Did respondent know or should it have known of such propensities prior to such assault?

STATEMENT OF THE CASE.

Petitioner Harrison, a section foreman and the immediate superior of Anderson, a section hand in his crew, accused Anderson of stealing a ballast fork, the property of respondent (App. 26). Petitioner testified that he then turned away and was immediately struck by Anderson (App. 26). Other employees then present testified that Anderson denied the accusation (App. 54, 59, 63), and told Harrison he would strike him if the accusation was repeated (App. 54, 63). The accusation was repeated whereupon Anderson struck Harrison one blow on the back of the neck (App. 54, 59, 63).

Petitioner offered no evidence that Anderson, prior to the assault, was pugnacious, vicious or contentious, or that he did any act evincing such propensities, or that he had the reputation of being pugnacious and vicious. Petitioner in fact testified he had never seen Anderson strike anyone (App. 39). The evidence of respondent was overwhelming that Anderson did not have such propensities corroborated by all of the other foremen living at the time of trial, under whom Anderson worked (App. 66, 67, 69), and several of his co-workers (App. 57, 62, 70, 71, 73, 74).

Petitioner did testify to the statements of Praft, the roadmaster, as quoted on page 3 of the petition, which

statements were denied by Pratt (App. 48, 50). In addition, petitioner testified that Anderson had stuck pins in petitioner's seat on the motor car on one occasion, made vulgar remarks while passing over public crossings, refused to push the motor car to get it started (App. 24), and would not do his share of the work (App. 34). Anderson denied the foregoing events (App. 55), and the two other crew members either denied that such events occurred or had no knowledge of their occurrence (App. 57, 59, 62).

Petitioner testified he reported these events to Pratt who did nothing (App. 24). Pratt denied that any such events were reported to him (App. 50).

ARGUMENT

I. Insufficiency of Record.

Whether the writ of certiorari sought should be directed to the Supreme Court of Illinois as petitioner prays, or to the Appellate Court of Illinois as respondent believes, the record filed in this court is insufficient. Petitioner has not filed with the Appendix, as required by Supreme Court Rule 21 (3) "all the proceedings in the court below, the whole to be duly certified." Only an abstract of the Appellate Court proceedings has been filed beginning on page 87 of the Appendix. The only proceedings in the Supreme Court filed are the Appendix and the petition filed for leave to appeal.

The record filed here does not contain the judgment of the Appellate Court, but only an abstract of the entry thereof (App. 84 (48)). Nor does the record here contain the judgment of the Supreme Court of Illinois, although it is copied as Appendix C in the petition.

Under Illinois law, the judgment of the Appellate Court of Illinois became final when the Supreme Court of Illinois denied leave to appeal. Illinois Revised Statutes, 1961, Chapt. 110, Para. 75 (Appendix A).

The final judgment, therefore, sought to be reviewed here is the decision of the Appellate Court, although the petition for leave to appeal and the denial thereof by the Supreme Court of Illinois were necessary to confer jurisdiction on this Court under Title 28, U. S. C., § 1257 (3). Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock, 279 U. S. 410, 73 L. ed. 766, 49 S. Ct. 363.

2. Opposing Issuance of Writ.

The petition here seeks review of questions decided adversely to petitioner by the Trial Court, the Appellate Court of Illinois, and the Supreme Court of Illinois when, in its discretion, it denied leave to appeal. While the Supreme Court's refusal to review the case is not as authoritative as if it had reviewed and affirmed the Appellate Court, its judgment is an approval of the result. As this Court said in Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock, 279 U. S. 410, 73 L. ed. 766, 49 S. Ct. 363, in a case decided by Illinois courts:

> "While such denial is not an approval of the reasons on which the Appellate Court rested its judgment, it is an approval of the conclusion reached by it and is therefore, in effect, an affirmance of the judgment."

The Supreme Court of Illinois has been as zealous as any State Court in protecting the rights of employees under the Federal Employers' Liability Act; and it has been careful to heed the admonitions of this Court as to the relative functions of the Court and jury in such cases. In the recent case of Finley v. New York Central Railroad Co., 19 Ill. 2d 428, 433, 167 N. E. 2d 212, the Court quotes from Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443, as does petitioner on page 8 of his petition as to the nature of the judicial appraisal of proofs permissible by the Court in such cases.

Petitioner uses the first opinion of the Appellate Court of Illinois (App. A) as the basis of his argument that the Court decided the case only on the weight of the evidence. The language contained therein, which was deleted in the published opinion quoted on page 7 of the petition, was evidently a mental lapse of the scrivener of the opinion. It was not only wrong as to its function in the review of the

sufficiency of evidence in Federal Employers' Liability Act cases, but assuming it had the power to weigh the evidence, it was also contrary to state practice, since the only proper judgment on deciding the verdict was against the manifest weight of the evidence was to reverse and remand for a new trial.

When the Appellate Court became aware of its error, it recalled the opinion, as it had a right to do, and it then had a free chance to express its true intent, either to hold that there was some evidence to sustain the verdict and reverse, or hold there was no evidence to sustain the verdict and affirm. It chose the latter course, not by a final modified opinion as petitioner suggests, but as the one and only opinion of the Court.

We submit, therefore, that it can be said with confidence in this case the Illinois courts have made such appraisal of the evidence as this Court requires and found petitioner's evidence did not, with reason, warrant the conclusion that respondent's negligence played any part in petitioner's injury.

The ultimate determination of this case is of interest only to the litigants. No public interest is involved; there are no important legal principles involved.

This case appears to have been decided in accordance with prior decisions of this Court, and not in conflict with any prior decisions. In Atlantic Coast Line Railroad Co. v. Southwell, 275 U. S. 64, 72 L. ed. 157, 48 S. Ct. 25, this Court considered a case where one railroad employee having killed another employee, suit was brought by the decedent's administrator against the railroad for the death, charging the railroad permitted or failed to prevent the murder, contending threats had been made by the assailant against decedent on previous occasions and the railroad knew or should have known thereof and should have taken

action to prevent it. The Court, speaking through Mr. Justice Holmes, said:

> "The only sinister designs of which there is any evidence were of Southwell (the decedent) against Dallas (the assailant), unless Dallas' remark just before the shooting be taken to foreshadow the event which it certainly did not seem to until after the event had happened. It appears to us to be extravagant to hold petitioner liable in a case like this."

This case was tried on the theory sustained by the Supreme Court of Illinois in the case of Tatham v. Wabash Railroad Company, 412 Ill. 568, 107 N. E. 2d 735, where the Court held that a complaint alleging that Davis was pugnacious and vicious, that the railroad employed him with knowledge of those propensities, and that plaintiff was injured by a wilful assault by Davis stated a cause of action.

This Tatham case as well as Southern Railway Co. v. Roberts, 1953, 5 Cir., 206 F. 2d 508, 512, and Dincher v. Great Atlantic & Pacific Tea Co. (Pa.), 51 Atl. 2d 710, 745, hold that proof that the assailant was in fact pugnacious and vicious is a necessary element of the cause of action. Petitioner has offered no evidence on this issue.

Petitioner being unable to adduce evidence that Anderson was pugnacious is forced to base his action on the statements he attributes to Pratt, the roadmaster, quoted on page 3 of the petition to prove the fact of pugnacity and the railroad's knowledge thereof. Such a statement is too tenuous upon which to base liability. Inman v. Baltimore & Ohio Railroad Co., 361 U. S. 138, 4 L. ed. 2d 198, 80 S. Ct. 242. These statements are not meaningful, absent some evidence as to Anderson's traits to give them character and meaning. They do not tend to prove that respondent's roadmaster knew that Ander-

son was pugnacious, and they do not tend to prove that he was in fact pugnacious. The only evidence in the case tending to give meaning to the roadmaster's words is that of petitioner that Anderson was a practical joker, disobedient, used vulgar language at crossings and would not do his share of the work. These characteristics describe a bad actor and a trouble maker but do not suggest that other employees are endangered by any reasonable probability of violence by such a person.

We respectfully submit that under the evidence in this case, it cannot be said with reason that the conclusion may be drawn that negligence of respondent played any part in the injury.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

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APPENDIX A.

§ 75. (Civil Practice Act, § 75). Jurisdiction of Appellate and Supreme Courts.

(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.

(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (a) in case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case decided by them involves a question of such importance, either on account of principal or collateral interest, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (b) In any such case as is hereinbefore made final in the Appellate Court, it is competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the Supreme Court. (c) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final

judgment or decree entered in the cause in the trial court reverses the judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered presents to and files with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing." Thereupon it is competent for the Supreme Court to grant leave to appeal from such final judgment of reversal for its review and determination with the same power and authority in the case and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section.

Provided, however, the application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made within 40 days after the judgment of the Appellate Court has become final, either through the denial of a petition for rehearing or the expiration of the time within which a petition for rehearing might be filed; otherwise the power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist. Answers to such petitions for leave to appeal may be filed by respondent within 15 days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granting within such 15-day period. As amended 1959, July 21, Laws 1959, p. 1784.